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In This Issue

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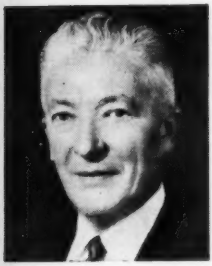
VOL. 29 MAY, 1954 No. 8

The President's Page

By Harold A. Black



Harold A. Black

A citation goes to Eddie Simpson, Fred Horowitz and Howard Nicholas for an outstanding piece of work in representing Judge Peirson M. Hall, as a respondent court and judge, in certain recent proceedings for extraordinary writs in the United States Court of Appeals. As the Federal Government was itself a petitioner, the United States Attorney could not represent the District Court. Since it was necessary to avoid any commitment on the merits of the case on questions of law or fact, the judge of course having no personal interest in the outcome, it was not feasible for counsel for any of the parties to act for the court. In this situation the three men above named volunteered to accept the assignment. The matter was extraordinarily complex,—a water case involving a tremendous record and many hundreds of exhibits. The preparation of the response to the order to show cause required substantially three weeks, including Saturdays and Sundays.

I have a letter from Judge Hall which but for space limitations I would quote in full. It closes as follows:

> "Had I, as an individual, attempted to secure counsel in a similar situation, I doubt if any monetary reward could have induced any one of the three, much less all three, to have undertaken the task. That they did so in the public interest, without reward, other than the satisfaction of

exemplifying the highest ideals of an honorable profession, should be a matter of pride to all lawyers."

* * *

David Smith, Chairman of our Federal Courts Criminal Indigent Defense Committee, could use a few more volunteers to help in this much-needed activity. Don't leave this job entirely to the juniors. I know you're busy. So are most of the others engaged in this work. Dave's telephone number is MAdison 6-1441. Use it.

* * *

I hope you will all help in our membership campaign (the first in many years) which is now under way. If you have not returned the post card which accompanied my circular letter of April 19, please do so. If you have misplaced it, and are willing to interview personally not more than five "prospects" whose offices are close to yours, please telephone the Association office and you will be put to work. Lou Elkins and his staff are doing a fine job on this project. With your co-operation, we can enlarge our membership without putting a heavy burden on anyone. There's no glory in it, but I am sure that will not stop you from giving us an assist.

The Case of the Reluctant Expert

By David Mellinkoff
A.B., Stanford, '35; LL.B., Harvard Law School, '39

David Mellinkoff

There are few who enjoy the role of witness. Only the case-hardened extrovert relishes the prospect of having his most forthright declaration doubted, his partiality assumed, his origins questioned, and his most innocent lapse ridiculed. Fortunately the supply of witnesses exceeds the demand of litigation and the average mortal is not often called. But doctors are not average mortals. And witness-duty is practically an occupational hazard of the medical profession.

From his hot-seat in the witness box, the unhappy physician gazes forlornly out on his brother professionals—the lawyers. His thoughts are not kindly: (a) the lawyer is here by choice; and (b) the lawyer is being well paid for his time, or at least has the hope of bountiful compensation.

Should Doctors Receive Compensation for Their Services as Witnesses in Excess of Statutory Fees Accorded the Lay Witness?

The thunderous affirmative response of the medical profession finds expression in the words of the well known San Francisco neurologist-psychiatrist, Dr. Joseph Catton. He declines to give free medical opinion on the ground that the questioning of lawyers calls for:

> "'. . . the use of faculties of a physician, neurologist and psychiatrist, and his opinion based thereon, which opinion is a portion of my property which I do not wish to be deprived of without due compensation and arrangement having been made in relation thereto.'"[1]

On two separate occasions twenty years apart the Supreme Court of California has sustained Dr. Catton's polite but firm refusal to disgorge uncompensated medical opinion. In each in-

[1] *City and County of San Francisco v. Superior Court*, 37 Cal. (2d) 227, 231 (1951).

stance, however, the Court has approved his refusal on grounds other than the matter of compensation.[2]

The negative of the proposition, i.e., that doctors should testify on the same footing with lay witnesses, finds a formidable exponent in Professor Wigmore. He asserts that the doctor is no more inconvenienced by court attendance than the mechanic, and is perhaps better able to suffer the loss of time involved; that it is one of the obligations of citizenship to suffer the tribulations of the witness stand; that no one was ever deterred from entering upon the practice of medicine through fear of the burden of being required to testify in court.[3]

The answers of the various States to the question are in hopeless—often violent—disharmony. The no-fee rule finds clearest expression in enactments such as the Alabama statute specifically requiring expert witnesses to testify without added compensation.[4] Decisions in some states declare contracts for added compensation illegal.[5] The opposing view zealously regards expert opinion as property which must be paid for. This thesis has been carried to the extreme in a New Jersey malpractice case: Plaintiff was permitted to examine defendant doctor as to factual occurrences, but not as to the defendant's opinion as to hypothetical methods of treatment:

> "... The plaintiff was then invading the realm of expert knowledge thereupon attempting to make the witness not a mere relator of facts, but an expert witness on behalf of the plaintiff."[6]

California's position in the battle of the medics is not entirely clear. Certain decisions have deliberately ducked "the troublesome question".[7] Others have poured forth dicta which are indicative of the judicial approach to the question in this state, but not decisive.[8] California thinking on the subject may be summarized as follows:

1. A DOCTOR WHO TESTIFIES VOLUNTARILY, WITHOUT PRIOR ARRANGEMENT, HAS NO CLAIM FOR ANYTHING OTHER THAN ORDINARY WITNESS FEE AND MILEAGE.

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[2]*City and County of San Francisco v. Superior Court, supra,* and *Webb v. Francis J. Lewald Cole Co., et al,* 214 Cal. 182 (1931).
[3]*Wigmore on Evidence,* Vol. VIII, 3rd Ed., Sec. 2203, pp. 131 *et seq.*
[4]*Title VII,* Sec. 366, Code 1940.
[5]*Burnett v. Freeman,* 125 Mo. App. 683, 103 S.W. 121; *Thomas v. Ruhl,* 7 Boyce, Del., 437, 108 A. 78.
[6]*Hull v. Plume, et al,* 37 A. 2d 53, 46; 131 N.J.L. 511 (N.J.) 1944.
[7]*Webb v. Francis J. Lewald, et al,* 214 Cal. 182, 187 (1931).
[8]Discussed, *infra,* p. 6, *et seq.*

(Continued on page 250)

Fact Finding Committees—Are They Supplementing or Supplanting The Direct Primary

By Frank S. Balthis

Member of the Los Angeles law firm of Sheppard, Mullin, Richter & Balthis; former editor of LOS ANGELES BAR BULLETIN, 1946-1948

Frank S. Balthis

During the first fifteen or twenty years after the turn of the century, as part of the great democratic reform movement, the direct primary was adopted widely and rapidly throughout the United States. Essentially, the direct primary was adopted as a revolt against the abuses of "bossism" and corruption which existed in the old convention and caucus methods. The new democratic procedure supplanted the nominating convention as a method of choosing party candidates for congressional and state offices.

We are now witnessing widespread use of fact finding committees, party conferences and pre-primary endorsements, and all of these tend to weaken the whole primary system. The recent attempt to use county central committees and state committees for pre-primary endorsements particularly calls for a review of our primary system for choosing candidates. It would appear that in many instances the movement for pre-primary endorsements is going so far that it may by custom and usage destroy the effectiveness of the direct primary. As all students of government know, custom or usage may be just as effective in changing a political institution as the amendment of statute or constitution. One need only think of how the original system for the election of the President of the United States by an electoral college was changed by usage and extra-legal procedures to a system of national party conventions and direct vote of the people.[1]

Adoption of the Direct Primary in California

In reviewing the primary system as established in California, we note that a Constitutional amendment (Section 2½, Article II) was adopted in 1908, providing in part:

". . . the Legislature shall enact laws providing for the direct

[1]For an interesting discussion of what the original framers of the Constitution intended, see Munro, *The Makers of the Unwritten Constitution*, pp. 15-17.

> nomination of candidates for public office, by electors, political parties, or organizations of electors without conventions, at elections to be known and designated as primary elections."

Pursuant to this constitutional authorization, the Primary Election Act of March 24, 1909, was adopted by the Legislature, and the constitutional validity of the statute was upheld in *Socialist Party* v. *Uhl* (1909), 155 Cal. 776. The court describes the 1909 Act (p. 782):

> "The act as a primary act is distinct and complete as providing for direct nominations, with the added feature relating to an advisory vote relative to United States senators."

The provision with respect to the advisory vote on United States senators was, of course, prior to the adoption in 1913 of the Seventeenth Amendment to the United States Constitution providing for the direct election of the senators by the people.

While the 1909 Act did contain the basic elements of the direct primary, the complete direct primary system as we know it today was enacted in 1913. (Direct Primary Law of June 16, 1913, Stats. 1913, Ch. 590, p. 1404.) A feature of the new primary law was that it permitted cross-filing and this was upheld in *Hart* v. *Jordan* (1914), 168 Cal. 321, where the court said (pp. 322-323):

> "By the amendment of 1908, adding section 2½ to article II of the constitution, the legislature is directed to enact laws providing for direct nominations at primary elections. . . . Under this section, the legislature may prescribe tests and conditions for candidates, as well as for electors.
>
> * * * * * * * * *
>
> "But it is not bound to make membership in a party a condition of the right to seek the nomination of that party. The selection of candidates of the party is, under the law, committed to those who have declared their affiliation with it. If they, the members of that party, seek to select as their candidate one affiliated with another party, or with no party, that is their privilege."

The Functions of the County Central Committee Under the Primary System

The 1913 law also changed the method of selecting the county central committees which previously had been chosen by party conferences. Under the new Act, county committees were to be elected directly by the voters at the primary election. It had been previously established by usage that the county central committees conducted the campaign after the candidates of the party had been

(Continued on page 240)

Brothers-In-Law

By George Harnagel, Jr.

George Harnagel, Jr.

The Committee on Bankruptcy and Corporate Reorganizations of the Association of the Bar of the **City of New York** has voted to disapprove bills introduced by Senator William Langer which provide for the conduct of bankruptcy administration by a salaried corps of official trustees, receivers and attorneys and for the greater participation in such administration by United States Attorneys.

* * *

The Detroit Lawyer recently carried the following story regarding the practice of law in **Boston**:

> "[A Detroit lawyer] had a recent experience with attorneys in Boston from which he is still a little dizzy. It appears that a client of his was driving with his wife in that city when he had the misfortune to be involved in an automobile accident. While being questioned by the police, the client had a heart attack and died. Some fast-thinking local lawyers had one of their number appointed special administrator by reason of the deceased having died leaving personal property, to-wit: an automobile, in Massachusetts. The special administrator then sold the car to the wife for $500.00, she being obliged to obtain some means of transportation back to Detroit. Sometime later the wife brought to [the Detroit lawyer] the Boston lawyer's final account, showing total administration expenses of $478.00 and requesting a consent to the allowance thereof. Needless to say, the consent was not obtained. The result: The lawyers had the account published at a cost of $22.00, thereby wiping out the entire estate."

We've passed the article along to the President of the Boston Bar Association, a very nice fellow with whom we studied law, quite a while back.

* * *

The State Bar of **Michigan** has established a Committee on Character and Fitness, with subcommittees in each congressional district. It is the duty of the several subcommittees to investigate the moral character and requisite qualifications (other than scholastic) of student applicants for admission to the bar, to interview personally each applicant, and to report to the State Board of Law Examiners within such time as is prescribed by that board.

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"Judge Learned Hand was at the Law School of the University of Pennsylvania the other night to address its alumni, and Dean Fordham was showing the Judge around . . . They had just entered the library when the Dean was summoned to the telephone . . . Not wanting to leave the Judge alone, the Dean hastily introduced him to an awe-stricken first-year student, who was waiting for a book . . . Frantically the embryo barrister searched his mind for something legalistic to say to the scholarly jurist . . . What does one say to such a sage? . . . Suddenly his eyes acquired an inspirational gleam and he said, 'Judge, what do you think of Corpus Juris Secundum?' " — From *The Shingle* of the **Philadelphia** Bar Association.

* * *

"The best cases on holograph wills are to be found in Quebec and California." — From an article on "Holograph Writings" by Judge W. J. Lindal in *Manitoba Bar News*.

* * *

"But what makes a good lawyer? . . . I think the answer is: one who has not only technical proficiency but who has, in addition, a love of the law and a passion for justice." — From an address by Dean Joseph O'Meara of the Notre Dame Law School.

* * *

"Errors in judgment in the conduct of a trial can often be buried in the inscrutability of a verdict. The fortunes of litigation may on occasion make a weak case strong. But in the office the counsel, discounting unexpected good fortune, must appraise the problem presented with dispassion and errors in his judgment may later appear starkly with no judge or jury on whom he can shift responsibility." — From an article on "Counseling and Counseling Fees" in *The Detroit Lawyer*.

* * *

"Your correspondent, [formerly] the only bachelor member of the Stevens County **(Washington)** Bar, . . . forsook the joys of bachelorhood and joined the more popular married ranks. . . . It is expected that [he] will hereafter attend to legal business with greater vim and vigor because of his added responsibilities. At least his partner so expects."—*Washington State Bar News*.

The Bar Association of Muskingum County, **Ohio,** invites the courthouse employees to its annual picnic, one of the principal features of which is a baseball game between the spryer members of the bar and their guests.

* * *

"Judges often have to work hardest in guiding through the maze of a trial young lawyers who were at the top of their classes in law school. They have learned their lessons well—in legal principles, but not in advocacy or resourcefulness. They have been trained better to argue appeals than to try cases."—From "Trial Judge" by Justice Bernhard Botein of the New York Supreme Court. (Simon & Schuster, 1952.)

* * *

Divorce is hash made of domestic scraps.—*South Dakota Bar Journal.*

* * *

The **Boston** Bar Association and the Boston Chapter of Chartered Life Underwriters recently held a joint dinner meeting followed by a panel discussion of the subject: The Lawyer and the Life Underwriter.

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The **Akron** Bar Association sponsors a radio series called "You Make the Laws."

* * *

The Cuyahoga County **(Cleveland)** Bar Association every year holds a public servant testimonial luncheon. This annual event this year honored six veteran county and municipal court employees.

* * *

We pass on to you without comment the following extract from the account of a divorce action which recently appeared in *The Shingle* of the Philadelphia Bar Association:

> "Judge Leonard Propper, sitting at 18th and Vine last week, showed the judgment of a Solomon. . . . A woman who appeared before him charged that, during all of her married life, her husband had spoken to her only three times. . . . Judge Propper awarded her the custody of her three children."

* * *

Advertisements and professional cards appearing in a recent issue of *Manitoba Bar News* include:

> "Established country law practice for sale, situated in expanding district. Good Library. Reasonable Terms."
>
> "Opportunity for capable junior barrister to become associated in established Winnipeg practice under an arrangement to acquire same on retirement of present owner in near future."
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> "Alex F. Sample, attorney at law . . . Alhambra, Calif. (adjoining Los Angeles). Formerly of Anderson, Sample, Hodges & Noonan of Regina, Sask."
>
> "There's no better investment than a government annuity. . . . Thousands of Canadians, not covered by pension plans, have taken advantage of a low-cost Government Annuity to guarantee their future security . . . Annuities Branch, Department of Labour."

* * *

The **New York** State Bar Association has prepared and distributed to local bar association offices throughout the state a statistical chart showing the minimum fees for 49 different items listed in the fee schedules of 49 local bar associations.

* * *

The man who watches the clock generally remains one of the hands.—**South Dakota** Bar Journal.

Opinions of Committee on Legal Ethics Los Angeles Bar Association

OPINION NO. 214
(November 5, 1953)

ADVERTISING—SOLICITATION—ATTORNEY ACTING AS PUBLIC STENOGRAPHER AND NOTARY PUBLIC AN ATTORNEY MAY ACT AS A PUBLIC STENOGRAPHER AND NOTARY AND MAY USE APPROPRIATE SIGNS PROVIDED THESE ACTIVITIES ARE NOT USED AS A CLOAK FOR SOLICITATION OF PROFESSIONAL EMPLOYMENT

An attorney makes the following inquiry:

"Before admission to the Bar on July 22, 1953, I was a public stenographer in a legal office. It is my desire to continue with the public stenographic and notary work until such time as I have sufficient legal work to support my office. I have a typewriter desk in the reception room where I do the public stenographic and notary work. At the present time I am doing the stenographic work for my associate and myself, as well as the public work. Is there anything unethical about this arrangement? I have sufficient customers for my public stenographic work, many of them are attorneys. I do not intend to advertise my public work in any way, except on the directory board of the building. The board merely states 'Public Stenographer—Room 307' and 'Notary Public—Room 307'. My name does not appear, except under the letter M, and then I am listed only as attorney at law. In the elevator of the building is a small sign reading 'Notary—Rm. 307'."

Members of the Bar may not solicit professional employment by advertisement or otherwise (Rule 2 of the Rules of Professional Conduct of the State Bar; Canon 27 of the Canons of Professional Ethics of the American Bar Association).

The American Bar Association Committee on Professional Ethics and Grievances has said:

"It is not necessarily improper for an attorney to engage in a business; but impropriety arises when the business is of such a nature or is conducted in such a manner as to be inconsistent with the lawyer's duties as a member of the Bar. Such an inconsistency arises when the business is one that will readily lend itself as a means for procuring professional employment for him, is such that it can be used as a cloak for indirect solicitation on his behalf, or is of a nature that, if handled by a

lawyer, would be regarded as the practice of law. To avoid such inconsistencies it is always desirable and usually necessary that the lawyer keep any business in which he is engaged entirely separate and apart from his practice of the law and he must, in any event, conduct it with due observance of the standards of conduct required of him as a lawyer." (Opinion 57).

See, also, Opinion 199 of this Committee, 28 Los Angeles Bar Association Bulletin 207 (March, 1953).

The American Bar Association Committee's Opinion No. 255 states that a lawyer may ethically conduct a legitimate lay business in such a manner as to be ethical under Canon 27 and is not necessarily to be condemned because the business contact might result in subsequent professional employment. That opinion states:

"It is important to determine whether or not the nature of the business and the relation of the lawyer to the business are so designed as to be likely to result in the employment of the lawyer in a professional capacity." (Opinion 255).

There is nothing unethical about an attorney acting as a notary public or a public stenographer. An attorney engaged in such activities must, however, keep such activities entirely separate and apart from the practice of law. For example, such a lawyer, employed as a notary or as a public stenographer should not undertake to render legal advice with respect to the subject matter of the employment or in any way solicit professional employment.

The use of the signs described in the inquiry appear to be proper in that they in no way solicit professional employment.

The Committee might be of a different opinion if the attorney's name were used in the advertising, or if there were more extensive advertising.

This Opinion, like all Opinions of the Committee, is advisory only (By-Laws, Article X, Section 3).

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L.A. Bar Ass'n Delegates and Alternate Delegates to 1954 State Bar Conference:

A. R. KIMBROUGH

FACT FINDING COMMITTEES

(Continued from page 230)

selected. This custom was recognized in *Hutchinson* v. *Brown* (1898), 122 Cal. 189, 193, where the court said (p. 193):

> "As to this, it is enough to say that, according to universal party usage in California, the central or executive committee of a party has no function after one election is over, except to preserve the organization and take the necessary preliminary steps for the assembling of the next convention."

The 1913 Act recognizes this usage as to the principal function of the county committees by the provision that the committees were to "have charge of the party campaign under the direction of the State central committee." It seems apparent from reading the statute that such committees were to have no part in the selection of party candidates but, rather, they were to conduct the party campaign.

The 1937 Amendments to the Primary Law Do Not Authorize Pre-Primary Endorsements by County Committees

A recent opinion of the Attorney General's office, issued March 9, 1954 (No. 54/29), concludes that "a county central committee, as an entity, may not lawfully endorse or support one of several candidates of the same party who oppose each other in the pre-primary campaign." This opinion points out that the 1937 amendments to the Direct Primary Law of 1913 have not changed or enlarged the powers of such committees to make pre-primary endorsements. The substance of the 1937 amendments and as now contained in Sections 2831 and 2832 of the Elections Code, is that the county committees do continue in existence from one primary election to the next at which their successors are elected, and also that the county central committees "shall perform such other duties and services for their respective political parties as seem to be for the benefit of each party." However, the main purpose of the county committee seems to be for the support of the party campaign and not to conduct intra-party campaigns for individuals. It is recognized that an endorsement of one candidate or faction as against another prior to the primary election would only cause dissension and have a tendency to weaken the party structure. This is stated by the Attorney General as follows:

> "Where, however, several candidates of the same party are contending for the party's primary election nomination, then the committee's endorsement is not for the benefit of the party.

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Instead, it is aimed at benefiting an individual or group within the party. We do not believe that the 1937 amendment was intended to lift the general restriction on pre-primary endorsements."

Endorsements as Between Candidates by State Committees Not Authorized

In a previous opinion (19 Ops. Cal. Atty. Gen. 12), the Attorney General also ruled as to participation by the State central committee in pre-primary endorsements as follows:

"Statutory authority to conduct party campaigns for party candidates necessarily excludes committee intervention among several contending primary election candidates or groups of candidates within the party. In the very nature of things such intervention can only render the committee impotent to fulfill the very duties which section 2829 (of the Elections Code) imposes upon it. Intervention on behalf of an unsuccessful primary election candidate can only result in a loss of mutual support and cooperation as between the committee, on the one hand, and the successful candidate and his adherents, on the other.

* * * * * * * * *

"The state committee, which the law has placed at the very helm of the party's general election campaign, is thus prevented by its own action from fulfilling its statutory function of party leadership . . . the statutory duty of party leadership prohibits, by necessary implication, pre-primary support by the state central committee of one of several contending candidates or factions within the party."

Original Use of Fact Finding Committees

There is no question but that the use of fact finding committees in certain instances has been advantageous. The original purpose of the fact finding committee was to permit a fairly representative group of party leaders to select an outstanding candidate, then to unify all elements of the party for the support of this candidate at the primary election. The argument is made that better men will run for office when they are assured of a pre-primary endorsement by a fact finding group. It is assumed, of course, that the group of party leaders making the selection are acting in the interests of the party and for good government and not for personal reasons.

Fact finding has also been used in the instance of a special election called to fill a vacancy after the death or resignation of an incum-

bent. For this situation the party may find it advantageous to unite as far as possible upon one candidate.

Suggested Limitations on the Use of Fact Finding Committees and Pre-Primary Endorsements

In spite of the claimed advantages of fact finding committees or party conferences in some cases, it does seem that there are limitations and restrictions which should be placed upon the further extension of this device. Some of these suggested limitations are:

1. Fact finding procedures and pre-primary endorsements should not be made by the county central committee or state central committees, or a combination of the two, as the use of such official bodies tends to break down and impair the usefulness of the direct primary's "free election."
2. Fact finding procedures and pre-primary endorsements should be restricted to local elections, that is, for congressional and assembly districts. If fact finding endorsements are attempted to be applied on a statewide basis, such as for the election of Governor, Lieutenant Governor, Attorney General, or other state offices, or for United States Senator, the territory is so large as to make the assemblage of party leaders essentially a nominating convention. Fact finding groups and party conferences should be confined to the relatively smaller informal groups.
3. As used in the smaller units such as assembly districts, there should be a determined effort to keep such fact finding committees from being taken over by a party "machine." While such procedures may start innocently enough, and with good intent, nevertheless, they may become merely a new refined name for the old "party caucus." The group selected should be representative enough so that it will not be dominated by a small faction. Fact finding by a small secret group which is set up to serve selfish interests should obviously be avoided. Also, there should be some public understanding of the composition of the fact finding group and opportunity should be afforded for the various interests of the party to be represented.
4. One of the methods used by fact finding groups is to call the various candidates before it and to ascertain in a preliminary way whether the candidate questioned will agree

to abide by the result and will resign or withdraw if he is not nominated. The writer has considerable doubt as to whether these particular methods can be justified.

CONCLUSION

The direct primary was adopted to eliminate domination by the "political machine" resulting in the selection of candidates who would obey the selfish interests. The great value of the direct primary is that it reserves to the people the right to select candidates for public office at a "free election." We should be careful that the custom or usage of making pre-primary endorsements is not so widely extended and used by extra-legal machinery as to impair the direct primary system which has safeguarded the people's interests for over forty years.

Silver Memories

Compiled from the World Almanac and the L. A. Daily Journal of February, March, April and May, 1929, by A. Stevens Halsted, Jr.

A. Stevens Halsted, Jr.

The State Senate has passed, by a vote of 30 to 8, the bill of assemblyman **Hornblower** of San Francisco which would permit any person of good moral character who has studied law three years the right to take the State Bar examination, irrespective of other educational qualifications. The bill is now before Governor **Young.** President **Thomas C. Ridgway** of the State Bar has expressed hope that the bill will receive a "pocket veto" since the measure is contrary to the State Bar's efforts to raise the standards of admission.

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At the Hague, the 16th session of the World Court of International Justice opened with **Charles Evans Hughes,** former Secretary of State, sitting as a judge.

Miller, Chevalier & Latham has been succeeded by the firm of **Miller, Chevalier, Peeler & Wilson. Dana Latham** has retired as an active member of the firm to assume executive duties with **Lee A. Phillips** and allied corporate interests. With **Fletcher Dobyns,** Mr. Latham will continue to be associated with the firm as counsel.

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President Hoover's new commission to investigate law enforcement is composed of: **George W. Wickersham,** Attorney General under President Taft; **Newton D. Baker,** Secretary of War under President Wilson; Col. **Henry W. Anderson,** attorney of Virginia; **Frank J. Loesch,** Vice-President of the Chicago Crime Commission; **Roscoe Pound,** Dean of the Harvard Law School; **Monte M. Lemann,** member of the Tulane University Law School; **William I. Grubb,** Federal Judge of Alabama; **William S. Kenyon,** Federal Judge and ex-Senator; **Kenneth R. Mackintosh,** former Chief Justice of the Washington State Supreme Court; **Paul J. McCormick,** Federal Judge of Southern California and **Ada Louisa Comstock,** President of Radcliffe College.

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Col. Charles A. Lindbergh and **Anne Morrow,** second daughter of **Dwight W. Morrow,** American Ambassador to Mexico, were married.

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The U. S. Supreme Court, by a vote of 6-3, barred **Rosika Schwimmer,** Hungarian pacifist lecturer, from American Citizenship because of a declaration by her that she would not bear arms in the defense of this country in the event of war.

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Charles Evans Hughes, Jr., son of the former Secretary of State and Associate Justice of the U. S. Supreme Court, is the new Solicitor-General of the United States. His post, which is regarded as the premier governmental law post next to the Attorney Generalship, was recently vacated when the present Attorney-General, **William D. Mitchell,** was promoted to President Hoover's cabinet.

* * *

At Moscow **Joseph Stalin** submitted his resignation as Secretary General to the sixteenth All-Soviet Communist Party

When Los Angeles Tapped The Sierra For Water...

In 1913, when the Owens River Aqueduct was completed—bringing life-giving water to Los Angeles through 250 miles of mountains and desert—this Bank had been conducting a Trust service for Southern Californians for a decade.

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Convention. The delegates declined to accept his resignation, and appointed **T. Molotoff,** one of the Secretaries of the Central Committee of the Communist Party, as substitute to Stalin.

* * *

At Philadelphia **"Scarface Al" Alphone Capone** of Chicago pleaded guilty to carrying concealed weapons (pistols) and was sentenced to a year in prison.

* * *

Mabel Walker Willebrandt of California has resigned as Assistant Attorney General of the United States. Mrs. Willebrandt, who was appointed to office by President **Harding** in 1921, has been in charge of the prosecution of prohibition, narcotic, internal revenue and customs law violations. No other woman has ever held an office of assistant cabinet rank in our nation's capital.

* * *

The impeachment trial of Governor **Huey P. Long** of Louisiana began before the State Senate at Baton Rouge. Before any testimony was taken, a motion to adjourn **sine die,** signed by 15 of the 39 Senators, was made. After an executive session, 24 Senators agreed to the resolution, and that ended the impeachment trial.

* * *

With the intent of an actual enemy, an army twin-motored bomber, which had battled its way 450 miles from Dayton through rain and wind, "raided" New York harbor and dropped a theoretical load of 2,000 pounds of bombs that reduced Governor's Island to "a smouldering heap of ashes." The plane was refueled in the air by another plane.

* * *

For all good sports who are tired of investing in oil wells or mines beside the Boulder Canyon dam, a new chance is being offered which will scare-off the pikers but the long-chancers never knew its like before. Deputy **Herbert Reeves** of the State Corporation Commissioner's office has favorably acted upon the application of Captain **George R. Frair** of the good ship "Arctic Tern" which isn't built yet but is going to be. The permit is for an enterprise for the collection and marketing of Holothurions from the South Seas, sometimes called "hoy-toms." The "hoy-tom" is a dumb sort of animal, doesn't mind being caught, is highly sedentary by habit, con-

tains minute nerve ganglia entirely at variance with the nerve of people who eat it (and only the Chinese do). Deputy Reeves has been fascinated with this tale of the South Seas, and how the intrepid captain proposes to fare forth after four shiploads of the slippery thurions. With the granting of this permit, there's something new on Spring Street, and soon the Arctic Tern will be standing in with scuppers awash under a bursting load of "hoy-toms," marvelous animals of the minute nerve ganglia. What Ho! Avast! Belay! Pipe the hawse pipes, and stand by for the Holothurions!

* * *

President **Hoover** has inaugurated daily medicine-ball exercise on the south lawn of the White House grounds from 7-7:30 A.M. For reasons of economy, the 7 horses quartered at the White House stable are being turned over to the War Department to be used at Fort Meyer, Va. The Presidential yacht "Mayflower," rejected by the President, is being sent to the Philadelphia Navy Yard to be decommissioned.

* * *

Captain **Frank Hawks** has established a new Coast-to-Coast record in flying non-stop from Los Angeles to Roosevelt Field, Long Island, in 18½ hours.

* * *

Houdon's life-cast bust of George Washington, which vanished from the New York State Capitol in the 1911 fire, was restored to Governor **Franklin Delano Roosevelt** by a reporter of the *Evening World* who had traced it to a New York farm where the statue had been buried.

* * *

Colonel **Charles A. Lindbergh** has inaugurated the U. S-Central America air mail service. His engagement to **Anne Morrow,** daughter of **D. W. Morrow,** U. S. Ambassador to Mexico, has been announced.

* * *

President **Hoover, Henry Ford** and **Harvey S. Firestone** helped **Thomas A. Edison** celebrate his 82nd birthday. Edison announced he had found a rubber weed that could grow in 7 months and could be mowed like wheat. Mr. Ford said he would try out the weed on his Georgia plantation.

Leon Trotzky, ex-War Minister of Soviet Russia, recently expelled from the USSR, arrived with his family at Constantinople.

* * *

Since the organization of the State Bar, San Francisco's Bar Association membership has decreased from 1,200 to 870 at the present time. The Los Angeles Bar, at the beginning of 1927 when **Kemper Campbell** become President, had 1,848 members and this number has now increased to 2,454. The membership in February, 1929, stands at 2,462.

* * *

Orville Wright has been presented the Distinguished Flying Cross by Secretary Davis. The medal was awarded by Congress to him and posthumously to his brother Wilbur for their contributions to powered flight.

* * *

At Daytona Beach, **Major H. O. D. Segrave,** the English racing driver, established a new world's automobile speed record when he drove his 900-horsepower *Golden Arrow* two ways over the beach at an average speed of 231 mph.

THE CASE OF THE RELUCTANT EXPERT

(Continued from page 228)

Witness fees are fixed by statute at $2.00 per day in civil trials and $1.50 per day on the criminal side, plus in each case ten cents per mile one way.[9]

If the statutory fee is demanded and not tendered in advance, the doctor need not attend; but claims for higher amounts are rejected.[10]

Absent specific prior agreement for extra compensation for testimony in court, no sum may be claimed on the basis of *implied contract*.[11]

In *Credit Bureau of San Diego Inc. vs. Johnson*, 61 Cal. App.2d sup.834, 843 (1943) the candid brain surgeon, Dr. Werden, testified that he came to court expecting to be paid, and further:

> "I can't recall whether there was an arrangement about that or not. Such services are usually paid for."

He was nonetheless restricted to the statutory per diem, and since the evidence was not clear as to the mileage covered, he was granted an extra ten cents on the assumption that he had traveled at least one mile.

2. AN AGREEMENT FOR COMPENSATION OF A WITNESS BASED ON THE CONTINGENCY OF SUCCESS OF THE LITIGATION IS ILLEGAL.

The impecunious litigant may give the proposed physician-witness assurance that if there is a recovery the doctor will be amply provided for. Such an agreement is illegal in the case of lay witnesses,[12] and has been severely condemned and held likewise illegal in the case of experts,[13] though none of the reported cases expressly involved physicians.

3. AN EXPRESS CONTRACT FOR EXPERT TESTIMONY IS VALID.

If the doctor's testimony may be extracted for a lay witness fee

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[9]Government Code, Section 68093, formerly Code of Civil Procedure Sec. 885a, formerly Political Code Sec. 4300g; Government Code 72230, making the same fee schedule applicable to witnesses in Municipal Courts; see also Government Code 68094, Grand Jury Witness Fees $1.50 per day, plus 10 cents mileage; Government Code Section 68095 Coroner's jury witness fee $1.00 per day, plus 10 cents mileage, and Section 68096 Justices Courts $1.00 per day, plus 10 cents mileage.

[10]*Credit Bureau of San Diego, Inc. v. Johnson*, 61 Cal. App. 2d Supp. 834, 843 (1943); *McClenahan v. Keyes*, 188 Cal. 574, 583 (1922) (for an earlier episode in Dr. McClenahan's legal experience see *McClenahan v. Howard*, 50 Cal. App. 309 (1920); *In re Levinson*, 108 Cal. 450, 457 (1895).)

[11]*McClenahan v. Keyes*, 188 Cal. 574, 584 (1922).

[12]*Pelkey v. Hodge*, 112 Cal. App. 424, 425 (1931).

[13]*Van Norden v. Metson*, 75 Cal. App. 2d 595, 599 (1946); (civil engineer) *Von Kesler v. Baker*, 131 Cal. App. 654, 658 (1933) (berry broker).

(as will hereafter appear), it may be questioned if there be any consideration for an agreement to pay him more.

In *McClenahan v. Keyes,* 188 Cal.574 (1922), reviewing the law on the subject, the Supreme Court observes:

> "In these states recognizing the right to extra compensation for a physician who testifies as an expert it is uniformly held that where such testimony is sought to be elicited without requiring any particular investigation on the part of the physician that he is required to testify without extra compensation."

And as to the California law:

> "If there is any further or additional obligation [beyond the statutory fee] it must arise from an express contract relating to the particular subject of the testimony and based upon the fact that the witness is required to use his expert knowledge in testifying."

In the usual situation, such a contract is at the least impracticable. And the possible scope of such agreement would appear to be severely restricted by decisions hereafter considered.

4. A DOCTOR WHO HAS MADE AN EXAMINATION MAY NOT REFUSE TO TESTIFY AS TO FACT OR OPINION ON THE GROUND HE HAS NOT BEEN PAID.

The physician-patient privilege will, of course, justify refusal to answer third party questions based on examination of the patient. What happens when no such privilege exists, or the patient waives the privilege?

In *Webb v. Francis J. Lewald Coal Co.,* 214 Cal.182 (1931), plaintiff was examined before trial by neurologist Dr. Joseph J. Catton, who made written report to plaintiff's attorneys and retained the customary copy of the report. "For some reason, however, possibly financial, respondent did not cause Dr. Catton to take the witness stand." Counsel for the defense, learning of the report, subpoenaed the protesting Dr. Catton, "without attempting to compensate him". The Doctor refused to produce his copy of the report. Hark to the drama of Hippocrates and Mammon as related by the Supreme Court:

> "At this point there followed a lengthy dissertation by the witness upon the ethics of the situation, the question of privilege and the important item of compensation. . . The court sustained the objection made by the witness himself to testifying upon the broad ground that he was entitled to satisfactory com-

> pensation from defendants and excused him from the stand with the statement that defendants could negotiate with him if possible, for compensation for his expert opinion and return him to the stand, to which statement of the court counsel replied that the witness had already stated that it was not compensation alone but the question of ethics as well that prevented him from answering the question. To this the court responded that they should attempt to overcome the state of mind of the witness with respect to the ethics of the situation."

The Supreme Court declined to enter into the more mundane aspects of the controversy, determining that the Doctor's report was actually a confidential communication between plaintiff's attorney and an agent of the client; also that the report was within the physician-patient privilege—and that the privilege had not been waived by suit. This latter position has been expressly disapproved in *City & County of San Francisco v. Superior Court*, 37 Cal.(2d) 227, (1951), hereinafter—for convenience—referred to as "Catton's Case".

By 1951, Dr. Catton was still battling for the medical profession, but losing ground rapidly. At the request of plaintiff's attorneys, he made a neurological and psychiatric examination of James Hession, and duly rendered his report to Hession's counsel. Defense counsel attempted to obtain by deposition the Doctor's findings upon the examination. Dr. Catton's refusal to answer was again sustained on the ground of the attorney-client privilege: he was interpreting Mr. Hession's condition to his counsel, as another might interpret the remarks of a client in a foreign tongue.[14] The asserted physician-patient privilege factually did not exist, and if it did—was waived by suit. Finally a unanimous California Supreme Court flatly rejected Dr. Catton's assertion of a personal privilege not to testify without compensation: Dictum it may be, but a good strong dictum, as reported in Catton's Case, 37 Cal.(2d) 227, 233:

> "Petitioner asks him to testify, not by reason of his expertness in a special field, but because of his knowledge of specific facts as to Hession's condition, facts pertinent to an issue to be tried. He is like any other witness with knowledge of such facts; it is immaterial that he discovered them by reason of his special training. In testifying as a witness he would *simply*

[14]The sequel appears in *Hession v. City and County of San Francisco*, 118 ACA 497, 509 (1953). Dr. Catton testified for plaintiff at the trial, the defense objecting to his testimony—the right to take deposition having been denied. Held: not error; privilege may be waived at any stage of proceedings. Judgment aff'd on rehearing, 122 ACA 644, 656 (1954).

be imparting information relevant to the issue, as he would had he been a witness to the accident in which Hession was injured."

[Emphasis added]

Other California cases (again by way of dicta) specifically declare that the uncompensated physician-witness may not object that a question calls for "expert testimony"[15] or an expression of opinion.[16] While the Supreme Court has not explicitly indorsed these views, it has cited the dicta in support of its conclusions in Catton's Case. The California Supreme Court has also cited in Catton's Case, the leading Alabama test case, *Ex Parte Dement,* 53 Ala.389, 25 Am.Rep.611(1875). There, the prosecution called Dr. Dement as its expert witness in a murder trial. The Doctor testified he had seen the wounded deceased. He was asked to describe the nature and character of the wounds, and also to describe their probable effect. The witness declined to answer: no compensation for his professional opinion had been paid, promised, or secured. A $5.00 fine for contempt was affirmed.

The examining physician forms an opinion at his peril:

5. EVEN THE DOCTOR WHO HAS NOT CONDUCTED AN EXAMINATION MIGHT BE REQUIRED TO TESTIFY FOR THE FEE OF A LAY WITNESS.

If the rationale of Catton's Case be that the medical witness is merely *"imparting information relevant to the issue",* the final easy step is that expert testimony of the physician may be compelled without added compensation even in those cases where his virginal contact with the facts at issue is in the courtroom. So held, in *Dixon v. People,* 168 Ill.179 (1897), cited in Catton's Case:

In the *Dixon* case, supra, the City of Springfield had been made defendant in a negligence complaint alleging a defective sidewalk. Dr. Dixon had no knowledge of the facts, but was nonetheless brought into court under subpoena by the City. He was asked a strictly hypothetical question—which, after stating the facts, requested the Doctor's opinion as to the probability of such an injury resulting from such a fall. The witness refused to answer, stating he had been paid no professional fee. A $25.00 fine for contempt was affirmed. The Illinois Supreme Court makes its point in this language:

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[15] *People v. Conte,* 17 CA 771, 784 (1912).
[16] *People v. Barnes,* 111 CA 605, 610 (1931).

> "Moreover, if a physician is to be allowed extra compensation as an expert witness, then men, pursuing other occupations which require special experience, will have the same right to demand extra fees. A banker will claim that he has earned extra compensation, a merchant will make the same claim; and so with men, engaged in other branches of business."

In the context of a condemnation case, a Pennsylvania decision suggests that perhaps a state or the Federal government might have the right to call uncompensated citizen-experts in matters "affecting the common weal", where the same right might be denied a private litigant.[17] But the distinction would seem particularly inappropriate where—as in the *Dixon* case, supra, the governmental unit is not litigating as sovereign. And the California cases do not support such differentiation. In fact, dicta in *People v. Conte,* 17 CA 771, 784 (1912) and *People v. Barnes,* 111 CA 605, 610 (1931)—both cited in Catton's Case—strongly support the view that purely expert opinion may be elicited from uncompensated professionals.

Certain it is that a doctor's opinion may be "information rele-

[17] *Penn. Co. etc. v. City of Philadelphia,* 262 Pa. 439, 105 Atl. 630 (1918).

vant to the issue", whether he has personal knowledge of the facts or not. So too may that of a lawyer:

6. A NON-COMPENSATED DOCTOR NEED NOT SPEND TIME IN OR OUT OF COURT QUALIFYING HIMSELF TO TESTIFY.

In *People v. Conte,* supra, the blunt instrument of death was a rock. A lay witness testified for the prosecution that the morning after the fatal night she found the rock covered with "fresh blood stains". The defense called one Dr. Endicott, a physician apparently unconnected with the deceased or the rock. Counsel asked the Doctor to examine the rock and to state if it was stained with blood. The witness declined to answer—his plea, not lack of opinion but of compensation. Conte's lawyer requested the court to make an order for the payment of Dr. Endicott out of the County treasury.[18] This the Court declined to do and directed counsel to question the witness. Counsel—apparently being of the mind that no expert was better than an unhappy expert "seemed to insist that some arrangement be first made for the payment of the doctor for his services as an expert witness", his client being unable to foot the bill. No further questions were asked. The trial court was firm and final. His determination was sustained on appeal, in an opinion that at once stabs and salves the medical profession:

> "We have no doubt that the doctor, having been sworn as a witness, could have been required to answer such pertinent questions as might have been put to him, notwithstanding that they might call for expert testimony and the doctor not recompensed or guaranteed compensation for his services as an expert, but we know of no rule of law which would have authorized the court to compel him to go to the trouble and, perhaps, some expense of scientifically investigating the cause of the marks on the rock for the purpose of qualifying himself to give expert testimony on that subject."

The rule of the *Conte* case, supra, that an unwilling expert need not spend time qualifying himself, was followed in *People v. Barnes,* 111 CA 605 (1931). Shown a letter for the first time on the witness stand, handwriting expert Chauncey McGovern declined on "ethical grounds" to express an opinion as to similarity between the letter and other exhibits he had previously examined. Minute examination and comparison were necessary, and this may not be

[18]CCP 1871, enacted in 1925, permits court appointment of an expert witness, payable by the County in criminal cases, and by the parties as the court determines in civil cases.

compelled. But if the witness had formed an opinion, his mind may be freely picked.

The time that a doctor spends in medical school, or the time he spends in a court listening to endless hypothetical questions, has not been classified in California as time spent in "qualifying himself to give expert testimony".

CONCLUSION

If the implications of California judicial expressions are followed in practice, the physician or other expert may confidently expect to end his days in the witness box. The more eminent one becomes in his profession, the more expert he becomes, the less compensation he may expect to receive. For $2.00 per day and 10 cents a mile (one way), he may become the perennial expert witness.

The uncomfortable, if cynical, feeling of defense counsel in *People v. Conte*, supra, that if the expert witness wanted pay and didn't receive it, his testimony might not be helpful, is doubtless general enough to deter mass raids on the medical—or legal—profession for "free" testimony. But the legal process should not be made to rest on a base of such dubious morality.

Expertness should not be penalized, nor should a worthy cause fail for want of a witness. One possible contribution to the problem would be a legislative extension of Code of Civil Procedure Section 1871 to permit discretionary Court appointment of expert witnesses in civil trials, on the same County-paid basis applicable to criminal trials. Finally, in a field where professional ethics may be acutely involved, the legal position should be well defined. The law is a thing of beauty when you can find it.

Appreciation of the Los Angeles Bar Association is extended to the members of the Federal Courts Criminal Indigent Defense Committee who are contributing their services and time on behalf of the Association and the Bar in general. Those who volunteered to serve during the month of April, 1954, are as follows:

JAMES LEEDS	NATHAN GREITZER
JOHN GALL	BILL LEVIN
JACK SURINSKY	HERBERT SELWYN
LEONARD MARTIN	ROBERT FEINERMAN

C. A. HEMMERLING